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No. 84-1728

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO,
NATIONAL COUNCIL OF EEOC LOCALS,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

BRIEF FOR THE NATIONAL TREASURY EMPLOYEES UNION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a dispute concerning an agency's compliance with the laws and regulations that govern contracting out, including OMB Circular A-76, may be submitted to arbitration under 5 U.S.C. 7121.

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INTEREST OF THE *AMICUS*[1]

Amicus, the National Treasury Employees Union (NTEU), is a federal sector labor union that is the exclusive bargaining representative of over 110,000 federal

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[1] Pursuant to Rule 36 of the Rules of this Court, all parties have consented to the filing of this brief. Their letters of consent are lodged with the Clerk.

employees nationwide. NTEU represents the interests of members of its bargaining units by, *inter alia*, negotiating collective bargaining agreements with agency employers and by arbitrating grievances under the agreements.

NTEU and its members have a vital interest in the outcome of this case, which presents issues concerning whether employees may grieve or arbitrate violations of OMB Circular A-76, a regulation which establishes the criteria and procedures agency employers must follow when deciding to contract out federal employees' jobs to private sector employees. Because the Court must determine whether the management rights clause of Title VII of the Civil Services Reform Act of 1978, 5 U.S.C. 7106(a)(2)(B), precludes arbitral review of agency compliance with the OMB directive and other laws governing contracting out, NTEU is submitting this brief to assist the Court in its consideration of these questions.

STATEMENT

1. This case involves the negotiability of a union proposal under The Federal Service Labor Management Relations Statute (the Statute), as amended, 5 U.S.C. 7101-7135. The proposal states that the EEOC "agrees to comply with OMB Circular A-76 and other applicable laws and regulations concerning contracting out." OMB Circular A-76 is a directive promulgated by the Office of Management and Budget pursuant to its statutory authority under the Budget and Accounting Act of 1921, 31 U.S.C. 1 *et seq.*, and the Office of Federal Procurement Policy Act Amendments of 1979, 41 U.S.C. 401 *et seq.* The Circular establishes procedures agencies are required to follow in determining whether goods and services needed by the federal government should be obtained under contract or in-house. EEOC declared the proposal non-negotiable when it was submitted during contract talks.

2. On review, the FLRA ruled the proposal negotiable. *Pet. App.* 40a-48a. It determined that the proposal did not interfere with EEOC's reserved authority to make determinations with respect to contracting out.[2] The FLRA explained that if the proposal were adopted, it would not establish any substantive limitations on EEOC's authority, but would merely incorporate into the contract the existing legal limitation contained in OMB Circular A-76, and the other laws and regulations that concern contracting out. *Id.* at 41a.

The FLRA rejected the EEOC's contention that the terms of OMB Circular A-76 rendered the proposal non-negotiable. The Authority noted that under 5 U.S.C. 7121, contracting out disputes must be subject to the negotiated procedure unless the parties expressly excluded them through bargaining.[3] Therefore, even if the Circular did purport to narrow the avenues of redress available to employees, it could not limit the scope of the grievance procedure, because the scope is set by statute. *Pet. App.* 42a-43a.

3. The court of appeals (with Judge MacKinnon dissenting) affirmed the Authority's decision and enforced its order. *Pet. App.* 1a-37a. It rejected as "untenable" the EEOC's argument that the management rights clause automatically renders any proposal concerning contracting out non-negotiable, because the clause itself contemplates

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[2] Section 7106(a)(2)(B) of the Statute reserves to management, among other prerogatives, "the authority . . . in accordance with applicable laws . . . to make determinations with respect to contracting out."

[3] Section 7121(a) of the Statute requires collective bargaining agreements to include procedures for the settlement of "grievances," as broadly defined at Section 7103(a)(9). Only five matters, none of which concern contracting out, are excluded by law from the grievance mechanism. 5 U.S.C. 7121(c). Under 7121(a), any matter that could be grievable *is* grievable unless the parties agree to exclude it. 5 U.S.C. 7121(a)(2).

that management's contracting out authority must be exercised "in accordance with applicable laws," such as A-76. 5 U.S.C. 7106(a)(2)(B). Since the union's proposal did not impose any additional substantive criteria governing management's decision, it did not "affect" management's reserved authority to make contracting out decisions, within the meaning of the Statute. *Id.* at 8a-9a.

The Court also rejected the EEOC's argument that the union's proposal would invade management's rights by subjecting contracting out decisions to the negotiated grievance procedure. The Court noted that under the Statute, a complaint asserting that a contracting out decision was not made in accordance with applicable laws, including A-76, would be grievable even in the absence of the proposal, given the Statute's expansive definition of the subjects covered under the grievance procedure. *Pet. App.* 11a-16a. Such a grievance does not impose substantive limitations on management's authority; "[r]ather, it provides a procedure for enforcing the Act's requirement that contracting out decisions be made in accordance with applicable laws." *Id.* at 14a.

Finaliy, the Court rejected EEOC's argument that the language of the Circular itself, stating that its provisions "shall not be construed to create" any right of appeal, rendered the proposal non-negotiable. First, the Court observed, the proposal does not "create" a right of appeal because that right was created by the Statute's broad grievance provisions. *Pet. App.* 16a. Second, the court said, "there is no indication in the Act or elsewhere of a Congressional intent to allow agencies to limit by regulation the statutorily defined grievance procedure." *Id.*

SUMMARY OF ARGUMENT

A. Under the Federal Service Labor Management Relations Statute, unlike the Executive Order regime that preceded it, the negotiated grievance procedure and binding arbitration are the favored means for resolving a broad range of employment related complaints. The court

of appeals correctly determined that under the Statute, disputes concerning compliance with the laws and regulations that govern contracting out, including OMB Circular A-76, are grievable because they fall within the statutory definition of "grievance," and because contracting out disputes are not excluded from the grievance mechanism by Section 7121(c).

First of all, complaints relating to agency compliance with the Circular are grievances under 5 U.S.C. 7103(a)(9)(A). These complaints concern "matter[s] relating to . . . employment" because the Circular's procedures and criteria are used to determine whether an employee will retain his job. This conclusion is consistent with the broad language Congress employed in 7103(a)(9)(A), and with Congressional intent to make the term grievance "all-inclusive."

In any event, compliance with the Circular is subject to the grievance procedure on an entirely independent basis because the Circular is a "law, rule, or regulation affecting conditions of employment." 5 U.S.C. 7103(a)(9)(C)(ii). The Circular is a "law, rule, or regulation" within the ordinary meaning of those terms because it is a statutorily based directive, that is published for notice and comment, and that is binding.

EEOC's argument that OMB Circular A-76 and other laws concerning contracting out are not sufficiently directly related to personnel matters and labor relations to be grievable is meritless. The Circular "affects conditions of employment" within the meaning of the Statute in its every application, since it determines whether employees will keep or lose their jobs to non civil service workers. In an analogous context, in the private sector, contracting out is considered a "condition of employment" subject to bargaining because it can result in the termination of employment.

B. The management rights clause does not bar application of the statutory grievance procedure to disputes con-

cerning agency compliance with OMB Circular A-76. That provision preserves management's authority to make contracting out determinations "in accordance with applicable laws." 5 U.S.C. 7106(a)(2)(B). By its own terms, the provision merely prohibits negotiation over substantive limitations on managerial authority beyond those imposed by external law. Since the proposal at issue here merely echoes the obligations already imposed upon EEOC by external law, it does not violate that prohibition.

EEOC's argument that arbitral review itself interferes with the exercise of its rights, would permit the management rights clause, which Congress intended to serve as a narrow exception to the obligation to bargain, to negate the grievance provision, which Congress made "all-inclusive." EEOC's argument employs the concepts of negotiability and grievability as though they were interchangeable, when in fact they are not. Many matters that are clearly grievable under Section 7121(a) require arbitrators to review the exercise of non-negotiable management rights to determine whether the agency has complied with external law. Yet Congress has not made every application of a management right non-grievable. Instead, it has exempted only five subject matters, none of which concern contracting out, from the grievance process.

EEOC's arguments that arbitral review will cause delay and expense are both irrelevant and unsubstantiated. Were additional delay or expense considered an infringement of management's rights, Congress would not have made the exercise of those rights subject to negotiation of "procedures" or "appropriate arrangements" (5 U.S.C. 7106(b)(2) and (b)(3)), and would have precluded arbitral review of any actions that implicate management's rights, not just those enumerated at 7121(c).

Contrary to EEOC's arguments, arbitral review will not result in "second guessing" of agency managers or misinterpretations of the Circular's requirements. Arbitrators in the federal sector are charged with, and there-

fore familiar with ensuring compliance with external law, as well as the collective bargaining agreement. Arbitrators will intrude no more into managerial discretion than the Circular permits, and if they overstep their authority, the FLRA will reverse their awards.

C. OMB may not limit the statutorily prescribed scope of the grievance procedure by including a clause in its regulations asserting that they are not subject to the grievance process. Section 7117(a)(1) does not give OMB that right, because Section 7121(a), which imposes the duty to include grievance procedures in the contract, augments the more limited general duty to bargain set out in Section 7117(a)(1).

Nor does the fact that contracting out is the "subject" of Circular A-76, render the union proposal non-negotiable. Section 7117(a)(1) prohibits bargaining over matters that are the subject of government-wide rules or regulations. The union is not attempting to "bargain" or "negotiate" about the matters contained in A-76, it is only seeking to incorporate them into the contract.

ARGUMENT

I. THE STATUTE ITSELF MAKES VIOLATIONS AND MISAPPLICATIONS OF OMB CIRCULAR A-76 AND OTHER LAWS AND REGULATIONS CONCERNING CONTRACTING OUT GRIEVABLE AND ARBITRABLE

The court of appeals correctly concluded that disputes concerning agency compliance with Circular A-76 are subject to the grievance procedure under 5 U.S.C. 7103(a)(9) and 7121(a). This conclusion follows from the clear expression of Congressional intent that, unlike the practice under the Executive Orders, the statutory grievance mechanism would cover virtually all employment related disputes in the federal sector.[4]

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[4] Although we address the issues here, when this case was before the court of appeals and the FLRA, the EEOC did not deny that a

A. Section 7121(a) of the Statute requires collective bargaining agreements in the federal sector to include "procedures for the settlement of grievances, including questions of arbitrability." "Grievance" is broadly defined as "any complaint by any employee concerning any matter relating to the employment of the employee," or any complaint concerning "any claimed violation, misinterpretation, or misapplication of any law, rule or regulation affecting conditions of employment." 5 U.S.C. 7103 (a)(9)(A) and (a)(9)(C)(ii). Only those employment related complaints specifically enumerated in the Statute (at 7121(c)), may not be the subject of negotiated procedures. Matters which *could* be grievable under the foregoing provisions *are* grievable unless the parties expressly agree otherwise. 5 U.S.C. 7121(a)(2). *See*, H.R. Rep. No. 1717, 95th Cong. 2d Sess. 157 (1978); *AFGE, Locals 225, 1507 and 3723* v. *FLRA*, 712 F.2d 640, 641-642 (D.C. Cir. 1983).

By creating the statutory preference for this "broad scope" grievance procedure, Congress consciously departed from the relatively limited scope of the grievance arbitration process under the Executive Order program. *See*, Section 13, Executive Order 11491. Under the Statute, the term grievance was intended to be an "all-inclusive" one. H.R. Rep. No. 1403, 95th Cong. 2d Sess. 40 (1978).

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violation of OMB Circular A-76 would be grievable under the Statute, nor did it deny that the Circular was an "applicable law" that constrained management's authority to make contracting out decisions under 7106(a)(2)(B). EEOC argued only that management's right to make contracting out determinations overrides employees' statutory rights to grieve violations of the laws that govern contracting out. By failing to raise the central arguments it has presented to this Court until the eleventh hour, EEOC precluded the tribunal Congress has charged with interpreting the Statute—the FLRA—from considering them. Under established principles, this Court should decline to consider EEOC's contentions. *E.g. Hoover* v. *Ronwin* 104 S. Ct. 1989, 1998 n.25 (1984); *Berkemer* v. *McCarthy*, 104 S. Ct. 3138, 3152-53 & n.7 (1984); *G.D. Searle & Co.* v. *Cohn*, 455 U.S. 404, 412 n. 7 (1982).

In addition to broadening the scope of grievances, Congress expanded the role of arbitrators in settling employment-related complaints, and in reviewing compliance with external law. Under Executive Order 11491 (at Section 14(a)), binding arbitration was not required, and under the earlier Executive Order 10988 (at Section 8(a)) it was not permitted at all. The Statute makes binding arbitration mandatory. 5 U.S.C. 7121(b)(3)(C). Congress made this change because experience under the Executive Orders had shown arbitration to be "an expeditious, credible, and cost-effective means of dispute resolution." *See* Subcomm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service, 96th Cong. 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, at 856 (Comm. Print 1979) (remarks of Rep. Ford) (hereinafter cited as *Leg. Hist.*). *See also, id.* at 923 (remarks of Udall).

B. OMB Circular A-76 is both a "matter relating to the employment of an employee" and a "law, rule or regulation affecting conditions of employment". Therefore, complaints concerning its application are grievable, unless the parties expressly agree otherwise.[5]

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[5] It is a universal practice in the federal sector to include provisions in the collective bargaining agreement like the one at issue here, in which agencies "agree" to comply with the law. This practice is followed, even though violations of laws that affect conditions of employment would be grievable in the absence of the provisions. The legality of the practice is firmly established, and EEOC does not challenge it. *Cf. Montana Air National Guard* v. *FLRA*, 730 F.2d 577, 579 (9th Cir. 1984).

EEOC nonetheless finds it anomalous that the union would seek to include the disputed proposal in the contract if, as we argue, violations of A-76 are already grievable. EEOC Br. 36, n.17. *See also, Defense Language Institute* v. *FLRA*, 767 F.2d 1398, 1402 (9th Cir. 1985). However, using the collective bargaining agreement to spell out the external laws to which the agency is subject

1. Agency compliance with the Circular, as the court of appeals noted, is "surely" a "matter relating to the employment of [an] employee" and therefore grievable under 5 U.S.C. 7103(a)(9)(A). *Pet App.* 13a-14a, n.18. EEOC's conclusory statement (Br. 38, n.19) that compliance with the Circular is somehow "too remote an issue" to relate to the employment of an employee, is unpersuasive. Its argument for a narrow construction of 7103(a)(9)(A) is completely at odds with the obviously broad language Congress employed and its explicit intent that the term grievance be "all-inclusive." A complaint alleging failure to comply with the standards governing contracting out is plainly a "matter . . . relating to employment". It is difficult to conceive of many matters more directly related to employment than the procedure an agency uses to determine whether it is cost effective to retain an employee in his position or whether to contract out his work. *Cf. Fibreboard Paper Products Corporation* v. *NLRB*, 379 U.S. 203, 210 (1964).[6]

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serves important practical purposes: First, it educates employees as to their rights and managers as to their obligations. Employees cannot be expected to comb the U.S. Code, Code of Federal Regulations, and the Federal Register to secure this information. Instead, the parties may choose to have all matters that govern their relationship encompassed in one document: the collective bargaining agreement. Moreover, expressly including an agreement to comply with existing law in the contract can circumvent in advance a later challenge to the arbitrability of a matter, thereby avoiding needless delay and expense.

[6] EEOC claims that assigning to subsections (a)(9)(A) and (B) the broad construction their language obviously requires would render subsection (C) superfluous. EEOC Br. 38, n. 19. This claim is meritless. Subsections (A) and (B) allow only employees and their representatives to file grievances when they have complaints concerning a matter relating to employment. Subsection (C) also gives the agency a right to pursue grievances, albeit only in the narrower category of situations where laws, rules, or regulations are implicated.

Moreover, even assuming that subsection (C) is subsumed by (A) and (B) with respect to employees and unions, that construc-

2. In any event, compliance with OMB Circular A-76 is grievable on an entirely independent basis because the Circular is also a "law, rule, or regulation affecting conditions of employment." 5 U.S.C. 7103(a)(9)(C)(ii). The Circular, in addition to being a "presidential policy directive" (EEOC Br. 24-26), is a mandatory statutorily based directive, that agencies may not disregard as merely advisory, and that is published for notice and comment in the Federal Register. *See* Office of Federal Procurement Policy Amendments of 1979, 41 U.S.C. 401 *et seq.*, particularly Sections 402 and 405 (giving OFPP authority to establish procurement policies that "shall" be followed by agencies).

The fact that the Circular effectuates executive policy and may be characterized as a "managerial tool" (EEOC Br. 24) does not remove it from the scope of the grievance procedure. The grievability of violations of a similar executive directive, the Federal Personnel Manual, is well established. The FPM is an official publication of the Office of Personnel Management, containing instructions, guidance, advice and policy statements to agencies on matters of personnel management. Federal Personnel Manual, Ch. 171, Subch. 2-1. Circular A-76 is an official publication of OMB, that serves a similar purpose with respect to budgetary matters. Both directives may be considered laws, rules, or regulations within the meaning of the Statute, because both are mandatory directives issued by agencies with statutory authority to oversee and establish uniform policy for all agencies in areas of government wide concern.

Contrary to EEOC's argument (Br. 24-26), whether or not APA review of an agency's compliance with the Cir-

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tion is still preferable to the construction EEOC suggests. Under EEOC's interpretation, the broad language of subsections (A) and (B) has no significance, and Congress' intent that the term grievance be "all inclusive" is frustrated.

cular is available is not relevant to whether the Circular's requirements may be considered "laws, rules or regulations" under Section 7103(a)(9)(C)(ii). There is nothing in the Statute or its legislative history to even suggest that Congress intended arbitral review to be coextensive with APA review; it did not define grievability by reference to the APA. Thus, regardless of the propriety of denial of APA review, compliance with the Circular's requirements may be subject to arbitral review under the Statute.[7]

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[7] In support of its argument that A-76 is not a "law, rule, or regulation," EEOC cites *Local 2855, AFGE* v. *United States*, 602 F.2d 574 (3d Cir. 1979) and *AFGE Local 2017* v. *Brown*, 680 F.2d 722 (11th Cir. 1982), *cert. denied*, 459 U.S. 1184 (1983) (declining to consider specific APA challenges to agency failures to comply with contracting out regulations). EEOC Br. 25-26.

But these cases do not even establish that violations of the Circular issued in 1979 are not subject to APA review, much less that they are not grievable. The *Local 2855* case concerned the old version of Circular A-76, rather than the 1979 issuance. The latter, of course, unlike the prior directive, was based on a specific delegation of Congressional Authority, the Office of Federal Procurement Policy Amendments of 1979, 41 U.S.C. 401 *et seq.* The 1979 Circular moreover, was far more detailed than the pre-1979 version. *See*, 44 Fed. Reg. 20556-57 (1979), (describing former Circular as "rather general" in comparison and describing changes). The *AFGE Local 2017* decision did not hold Circular A-76 was not law; indeed it noted that parts of A-76 had the status of law, by virtue of the Department of Defense Authorization Act. 680 F.2d at 724. The court declined review because it believed the particular question the plaintiffs raised was committed to agency discretion.

The cases do not hold compliance with A-76 is non-reviewable no matter what violation is alleged. In ruling the matters involved were "committed to agency discretion by law", the courts were merely responding to the types of challenges mounted in those cases. In fact, the *Local 2855* court noted that even where matters are committed to agency discretion by law, judicial review is still available if a specific regulatory command is violated. 602 F.2d at 580. As we describe *infra* at page 22, n.12, Circular A-76 contains many requirements that leave no discretion to agencies and for which review might be appropriate by an arbitrator, just as it would be by a court.

3. EEOC's contention (Br. 29-34, 37-38) that OMB Circular A-76 and other laws concerning contracting out are not sufficiently directly related to personnel matters and labor relations to be covered under 7103(a)(9)(C)(ii) is baseless. The grievance mechanism covers laws, rules, or regulations that affect "conditions of employment." Conditions of employment is in turn defined as "personnel policies, practices and matters affecting working conditions." 5 U.S.C. 7103(a)(14).

OMB Circular A-76 is a law that affects conditions of employment for the same reasons it concerns a "matter relating to . . . employment." *See*, *supra* at 10. Clearly, a law governing contracting out decisions concerns personnel policies and affects working conditions in the most direct and immediate sense possible, and in its every application, for it determines whether employees will keep their jobs. Thus, in *Fibreboard Paper Products*, this Court ruled that in the private sector, contracting out is a "condition of employment," because those words "plainly cover termination of employment which . . . necessarily results from the contracting out of work performed by members of the established bargaining unit." 379 U.S. at 210. The same result obtains in the federal sector. *Cf. AFGE and Air Force Logistics Command, Wright-Patterson AFB*, 2 F.L.R.A. 604, 606 (1980) *enforced as to other matters*, 659 F.2d 1140 (D.C. Cir. 1981) (availability of day care facilities is a condition of employment because it affects whether individual will accept and continue employment).[8]

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[8] EEOC also argues (Br. 37) that if the grievance provision covers laws that concern contracting out, then "every federal statute that arguably affects a unionized federal employee" will be subject to arbitration. For example, EEOC says (Br. 34), an employee could pursue a grievance alleging that he would not have been reassigned had an agency employer complied with the National Environmental Policy Act, or the Atomic Energy Act.

EEOC's statutory examples are obviously distinguishable from laws governing contracting out. Those Acts at most may affect an

4. EEOC contends (Br. 29-34) that precedent of the Federal Labor Relations Council supports its argument that A-76 is not sufficiently related to conditions of employment to be within the scope of the grievance procedure permitted by the Statute. It claims that under FLRC decisions, contracts could not incorporate agency regulations bearing on the types of employees that would be assigned to different projects, and speculates that the FLRC so held "apparently because such decisions relate less to the individual employee than to the manner in which the agency wishes to conduct its business." EEOC Br. 31.

EEOC's reliance on this precedent is misplaced. The two FLRC cases EEOC cites (Br. 31-32) ruled that proposals requiring the employer to comply with certain internal agency directives (concerning assignment of employees) were not negotiable. *AFGE Local 916 and Tinker Air Force Base, Oklahoma City, Oklahoma*, 5 F.L.R.C. 604 (1977); *AFGE Local 2118 and Los Alamos Area Office, ERDA*, 3 F.L.R.A. 296 (1975). The FLRC stated that the proposals would constrain management rights, and that it was "without significance" that management used internal regulations to establish the policies that guided the exercise of its rights. *AFGE Local 916*, 5 F.L.R.C. at 607. The FLRC did not explain this conclusion—it certainly did not, as the EEOC suggests, purport to rule that the regulations were not "applicable laws" within the meaning of the Executive Order's management rights clause.

EEOC's suggested interpretation of the FLRC's decisions is pure speculation. It is more likely that the FLRC

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employee's employment indirectly. By contrast, every application of the laws that govern contracting out concern personnel policies and potentially affect federal employees' jobs. Circular A-76, unlike NEPA or the Atomic Energy Act, is a law designed to effectuate the government's personnel policies and to affect conditions of employment.

found the proposals non-negotiable because the regulations at issue were internal agency directives, rather than regulations imposed by an external authority like OMB. By incorporating internal regulations into the contract, the agency's right to change its policies at will would be constrained. OMB Circular A-76, by contrast, is an external law with which agencies must comply, regardless of the contract.

II. THE MANAGEMENT RIGHTS CLAUSE DOES NOT PRECLUDE ARBITRAL REVIEW OF AGENCY COMPLANCE WITH OMB CIRCULAR A-76 AND OTHER LAWS THAT CONCERN CONTRACTING OUT

As we explained above, Section 7121(a) permits the parties to negotiate procedures for grieving and arbitrating any employment related complaints or any violation of laws, rules, or regulations that affect working conditions, except in those subject areas specifically enumerated at subsection (c). Although complaints or violations of the laws governing contracting out are not among those excluded matters, EEOC's central contention here is that the management rights clause, 5 U.S.C. 7106(a)(2)(B), bars use of the grievance procedure to resolve any contracting out dispute.

A. The management rights provision states that: "subject to subsection (b) of this section, nothing in the chapter shall affect the authority of any management official of any agency . . . in accordance with applicable laws . . . to make determinations with respect to contracting out." 5 U.S.C. 7106(a)(2)(B). As the court of appeals discerned, by use of the phrase "in accordance with applicable laws," Congress made it clear that the management rights clause merely prohibits negotiation over substantive limitations on managerial authority beyond those already imposed by external law. Pet. App. 8a-9a. The union's proposal that EEOC comply with the rules by

which it is undeniably governed does not work an impermissible constraint on management's reserved authority.[9]

B. EEOC contends nonetheless (Br. 17-22, 22-29) that arbitral review itself, even if only for compliance with external law, would impermissibly affect its authority to make decisions with respect to contracting out. This contention, however, would permit the management rights clause, which Congress intended to serve as a narrow exception to the general rule of negotiability, to negate the grievance provision, which Congress intended would be "all-inclusive." Under the EEOC's approach, employees could not grieve any matter that implicates a management right. The EEOC's proposed rule would entirely abnegate the principle of broad scope grievance procedures.

In fact, many matters that are clearly grievable under 7121(a) require arbitrators to review agency actions that implicate managerial rights for compliance with law. For example, the management rights provision preserves management's authority, in accordance with law, to direct, assign, layoff, and discipline employees. 5 U.S.C. 7106 (a)(1)(A). Under EEOC's view, violations of the laws applicable to these decisions would—contrary to accepted practice—not be subject to arbitral review. Indeed, under EEOC's view it is difficult to imagine any challenges at all that could be pursued under the negotiated procedure, since most management actions involve determinations made under the authority preserved in 7106(a) and (b)(1).

The fundamental flaw in EEOC's argument is that it consistently employs the concepts of grievability and negotiability interchangeably, although they are distinct.

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[9] EEOC argues (Br. 34-35) that even if the regulation is an "applicable law" it only constrains management's authority to the extent that contracting out decisions can be challenged within the agency. As we explain more fully *infra*, at 22-25, OMB is without authority to limit the scope of the grievance procedure the Statute prescribes.

There are many matters a union may not negotiate—such as the subject matter of statutes and government-wide regulations, or management rights—whose application employees may nonetheless grieve. By blending the two concepts, EEOC is attempting to expand the number of matters that are non-grievable.

But Congress clearly declared which matters are non-grievable—in Section 7121(c). When Congress wished to make any aspect of a non-negotiable management right non-grievable as well, it did so there. Congress could have said that every application of a management right is non-grievable, but it did not. Instead, in Section 7121(c), it made five specific matters non-grievable, and contracting out decisions are not among them.

The legislative history of the Statute, contrary to EEOC's argument, shows that Congress never intended the management rights clause to be interpreted to negate the broad grievability provision. It clearly shows that Congress perceived that arbitral review was entirely consistent with management's exercise of its preserved authority.

The exact language of Section 7106 originated in a floor amendment offered by Representative Udall. In an accompanying sectional analysis he explained that although his amendment added several management rights, the management rights section "is still to be treated narrowly as an exception to the general obligation to bargain over conditions of employment." He stated that the provision would have no effect upon employees' rights to file grievances. Representative Udall explained that, for example:

> "[M]anagement has reserved the right to make the final decision to "remove" an employee but that decision must be made in accordance with the applicable laws and procedures, and the provisions of any applicable collective bargaining agreement. The re-

> served management right to 'remove' would in no way affect the employee's right to appeal the decision through statutory procedures or, if applicable, through the procedures set forth in the collective bargaining agreement."

Leg. Hist. at 924.

Representative Ford, one of the chief House conferees on the bill, made a similar statement on the floor of Congress. Describing the relationship of the grievance provisions to management's rights be explained:

> Under the definition [of grievance] adopted by the conferees, so long as a rule or regulation 'affects conditions of employment,' infractions of that rule or regulation are grievable even if the rule or regulation implicates some management right. This interpretation of the definition is required both by the express language of the section and by the greater priority given the negotiability of procedures over the right of management to bar negotiations because of a retained management right. *Leg. Hist.* at 998.[10]

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[10] *See* also, *Leg. Hist.* at 994 (remarks of Rep. Ford) ("Only bargaining proposals which directly relate to the actual exercise of the enumerated management rights are to be ruled non-negotiable. An indirect or secondary impact on a management right is insufficient to make a proposal non-negotiable").

EEOC contends (Br. 39-40) that under the Executive Order, employees could not grieve matters that implicated management's rights. This is inaccurate; the very cases EEOC cites at page 31 of its brief involved arbitral review of actions taken under management's preserved authority to promote or discipline.

EEOC also says that the Senate bill "plainly did not envision that management rights would be grievable" because it permitted the negotiated procedure to "cover any matter . . . if not inconsistent with the provisions of this chapter" and because it made the scope of the procedure negotiable, while at the same time stating that management rights are not negotiable. EEOC Br. 39-40.

First of all, it is not "inconsistent" with the preservation of management rights to permit arbitral review for compliance with law. Second of all, the Conference Committee rejected the Senate's approach of making grievance scope negotiable. It mandated broad

C. EEOC argues that in the context of OMB Circular A-76, arbitral review will inevitably affect substantive decisionmaking. It contends that such review will cause delay and expense, and that arbitrators are bound to interfere with legitimate exercises of agency authority under the Circular. EEOC Br. 16-12.

1. First of all, even if arbitral review caused added delay and expense, that result could not be considered an interference with management's rights. Management has, after all, no right to violate the law, nor to go unquestioned. If Congress were concerned with delay or expense, it would not have made the exercise of management rights subject to negotiation concerning "procedures" and "appropriate arrangements," (5 U.S.C. 7106(b)(2) and (b)(3)) and it would have precluded arbitral review of any actions that implicate management rights, not just those actions described in 7121(c). Congress enacted the management rights provision to protect management's authority to establish substantive criteria, not to preclude proposals that would permit review of the application of the criteria in a particular case. EEOC's delay and expense arguments involve questions of policy, more properly addressed to Congress.[11]

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scope procedures unless the parties agreed otherwise. Mandating broad scope procedures while at the same time guaranteeing management rights clearly shows that Congress concluded the two were not inconsistent, and that management rights would not be "affected" by arbitral review.

[11] In many instances, the procedures and appropriate arrangements created at the bargaining table under 5 U.S.C. 7106(b)(2) and (b)(3) will delay the execution of management's decisions. Nonetheless, only if the procedure would prevent management from "acting at all" did Congress envision a violation of management's rights—it specifically rejected a provision that would have made a procedural proposal non-negotiable because of delay even where the delay the proposal engendered was "*unreasonable*". H.R. Rep. No. 1717, 95th Cong. 2d Sess. 158 (1978); *Department of Defense, Army Air-Force Exchange Service* v. *FLRA*, 659 F.2d 1140, 1155-

2. Further, EEOC's fears of delay are belied by the efficacy of the arbitral process. As this Court has noted, arbitration tends to promote the expeditious resolution of disputes and not, as the EEOC argues, protracted delay. *Boys Markets Inc.* v. *Retail Clerks Union*, 398 U.S. 235, 240 (1970). "It is for this reason," the D.C. Circuit has explained, "that arbitration is so widely favored in both public and private sector labor relations." *Department of Defense* v. *FLRA*, *supra*, 659 F.2d at 1158, n.98.

EEOC's assertion (Br. 19-21 & n.10) that delays will be caused by arbitral review and that these delays will cost the government $142 million in the years 1986-1989, moreover, has no support in the record. OMB cannot predict the extent to which review will cause delay or the cost of that delay, unless it also factors in the cost savings achieved because arbitral review will foster compliance with the Circular.

Moreover, employees as well as agencies have an interest in the speedy resolution of contracting out disputes. Thus, Congress has required negotiated procedures to be "fair and simple" and to provide for "expeditious processing." 5 U.S.C. 7121(b). The FLRA moreover, has provided for stays of arbitral awards pending review, so that arbitrators' decisions need not delay agency action that is permissable under law. 5 C.F.R. 2429.8. Of course, if the arbitrator's finding of non-compliance with the Circular is upheld on review, the agency must blame only itself and not the arbitral process for added delay and expense.

3. EEOC also protests that arbitral review will inevitably result in "second guessing" the agency's discre-

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57 (D.C. Cir. 1981) cert. denied, 455 U.S. 945 (1982); *NTEU* v. *FLRA*, 712 F.2d 669 673-674 (D.C. Cir. 1983). As The Conference Report explained, under subsections (b)(2) and (b)(3), "the parties may indirectly do what [subsection (a)] prohibits them from doing directly." H.R. Rep. No. 1717, *supra* at 158. *Cf. AFGE, Local 2782* v. *FLRA*, 702 F.2d 1183, 1187-1188 (D.C. Cir. 1983).

tion or misinterpreting the Circular's requirements, and that arbitral rulings on A-76 "will be grounded on considerations other than simple fidelity to the requirements of the Circular." EEOC Br. 21-22, 29. Like its "delay" and "expense" argument, however, this sort of objection could be posed to every form of arbitral review of agency compliance with external law. The objection has no merit because Congress has chosen, in the federal sector, to give arbitrators a significant role in interpreting the law. And it has put a check on their decisions by providing for review by the FLRA where the arbitral award is contrary to "law, rule, or regulation." 5 U.S.C. 7122.

EEOC's observation that arbitrators' competence "pertains primarily to the law of the shop, not the law of the land," and that arbitrators "effectuate the intent of the parties rather than the requirements of enacted legislation," Br. at 21, 29, quoting *Alexander* v. *Gardner Denver Co.*, 415 U.S. 36, 56-57 (1974), is particularly inappropriate in the context of federal sector arbitration. In the federal sector, where binding arbitration is required, the law of the shop and the law of the land are one and the same, because the employment relationship is governed by statute, and violations of law are grievable. As the D.C. Circuit has noted, "in the federal sector . . . arbitration is intended not only to ensure compliance with collective bargaining agreements, but also 'to review or police compliance with controlling laws, rules, and regulations by federal agency employers and employees alike'." *Devine* v. *White*, 697 F.2d 421, 438 & n.94 (D.C. Cir. 1982), quoting F. Elkouri & E. Elkouri, Legal Status of Federal-Sector Arbitration, 6-7 (1980).

There is no reason to suppose that an arbitrator will interfere with agency discretion or expertise, or misinterpret the Circular, any more than he would do so with any other law. Acknowledging the availability of arbitral review in contracting out disputes does not *ipso facto* sanction intrusion or second guessing, nor does it suggest

that every allegation that A-76 was violated will be arbitrable. Section 7121(a) requires collective bargaining agreements to include procedures for determining "questions of arbitrability," and Section 7122 provides for FLRA review. It would be most inappropriate for this Court to rule, as EEOC urges, that because some aspects of A-76 reserve discretion to managers, every agency violation of A-76, or any other law and regulation concerning contracting out, is non-reviewable.[12]

III. OMB CANNOT LIMIT THE STATUTORILY PRESCRIBED SCOPE OF THE GRIEVANCE PROCEDURE BY REGULATION

EEOC contends finally (Br. 42-47) that the union proposal at issue here is non-negotiable because 5 U.S.C. 7117(a)(1) states that the duty to bargain only exists "to the extent not inconsistent with any Federal law or any government-wide rule or regulation" and does not "extend to matters which are the subject of . . . a Government-wide rule or regulation." It claims that the union proposal is inconsistent with A-76, which is a government-wide rule or regulation and that in any event

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[12] In fact, A-76 contains a number of mandatory directives that leave agencies no discretion and under which there are clear guidelines and criteria to which an arbitrator could refer. The Circular cites specific examples of governmental functions that may not be contracted out under any circumstances (for example tax collection), 44 Fed. Reg. 20558; it requires agencies to review activities periodically and to conduct cost comparisons, *id.* at 20560-20561; and it mandates in detail the factors an agency must consider in conducting a cost analysis, *id.* at 20564-20591. The factors include specific percentages the agencies must employ in deriving the cost of fringe benefits or the value of assets. *Id.* An agency has no discretion to fail to perform these mechanical procedures in the manner the Circular requires, and there is no reason an arbitrator cannot determine whether they have done so, without invading the prerogatives, if any, the Circular reserves to management.

the proposal is non-negotiable because it concerns the subject of such a rule or regulation—contracting-out.[13]

A. To the extent that Circular A-76 purports to prescribe that its violation is non-grievable, it is inconsistent with Section 7121(a) of the Statute (see *supra* at 7-15) and therefore invalid. As the court of appeals stated: "[t]here is no indication in the Act or elsewhere of a congressional intent to allow agencies to limit the statutory right to file grievances asserting a violation of contracting-out regulations." *Pet. App.* 16a.

Indeed, the clear statutory duty to bargain over the scope of the grievance procedure belies EEOC's argument that Section 7117(a)(1) gives agencies the right to limit the scope by regulation. The legislative history of the provision creating that duty (Section 7121) shows that Congress intended that the only matters that could be excluded from the grievance procedures were those the parties agreed to exclude, or those enumerated in the law under 7121(c). *See*, H.R. Rep. No. 1717, *supra* at 157.

Read in light of 7121 and its history, Section 7117(a)(1) plainly does not give agencies the authority to limit by regulation the statutorily prescribed scope of the grievance procedure. Instead, Section 7117(a)(1) was intended to preclude an agency from negotiating proposals that are substantively inconsistent with a government-wide rule or regulation.

Two courts of appeals have adopted this reasoning. They have concluded that Section 7121(a), which imposes

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[13] We find it ironic that EEOC can assert Circular A-76 is a government-wide rule or regulation within the meaning of 7117(a)(1) because it is a binding policy imposed upon agencies by OMB, but that it also repeatedly disclaims that the directive is a law, rule, or regulation for any other purpose. EEOC's explanation of that anomaly (Br. 43, n.23) merely begs the question. It does not explain why Congress used the same "rule" or "regulation" language in defining a grievance, as it did under 7117.

the duty to include grievance procedures in the contract, "augments the more general duty to bargain set out in 7117(a)(1), and therefore may be interpreted to apply, even in circumstances where 7117(a)(1) would not otherwise require bargaining." *N.J. Air National Guard* v. *FLRA*, 677 F.2d 276, 283 n.7 (3d Cir.), cert. denied, 459 U.S. 988 (1982). *Accord, State of Nebraska, Military Dep't* v. *FLRA*, 705 F.2d 945, 950, n.8 (8th Cir. 1983). As the two courts of appeals concluded, the purpose of 7117(a)(1) is to limit the negotiability of proposals, not to limit the grievability of the violation of laws, rules or regulations. Obviously, Congress did not create Section 7117(a)(1) to permit agencies to nullify broad scope grievance procedures.[14]

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[14] Thus, the *N.J. Air National Guard* and *State of Nebraska* cases cited by EEOC (Br. 45-46) do not support its interpretation of 7117(a)(1), they support the court of appeals' decision below. Those cases involved a conflict between the union proposal and a statutory provision restricting grievability. In those cases, the courts were required to reconcile conflicting statutes and they eschewed reliance upon 7117(a)(1). This case, on the other hand, involves not a statute, but a regulation, which obviously cannot override the Congressional mandate contained in 7121.

California National Guard v. *FLRA*, 697 F.2d 276 (9th Cir. 1983), also cited by EEOC, involved the same issue as *N.J. Air National Guard* and *State of Nebraska*—whether the exclusive appeal mechanism of the National Guard Technicians Act of 1968, 32 U.S.C. 709(e)(5), precluded grievances under Section 7121. The court of appeals in *California National Guard*, unlike the other courts, placed some reliance on 7117(a)(1). But that court also said Section 7117(a)(1) was "designed specifically for situations where . . . the sweeping legislative scheme may come into conflict with other federal statutes." To the extent that the *California National Guard* decision could be interpreted to preclude bargaining over grievance procedures in the absence of a statutory conflict, we believe the decisions of the Third and Eighth Circuits are more persuasive. In fact, the Ninth Circuit purported to rely on the "well-reasoned" *N.J. Air National Guard* decision for its holding. *See also Indiana Air National Guard* v. *FLRA*, 712 F.2d 1187 (7th Cir. 1983) (adopting reasoning of Third, Eighth and Ninth Circuits).

B. EEOC's second argument, under 7117(a)(1), portends even greater danger to the statutory scheme. It claims that since contracting out is the "subject" of Circular A-76, which is a government-wide rule or regulation, "the duty to bargain" does not extend to the union's proposal. EEOC Br. 46-47.

But the union is not seeking to "bargain" or negotiate over A-76; it will merely incorporate the regulation into the contract. There would be no "discussion" of A-76 at the bargaining table. *See*, EEOC Br. 47. The purpose of precluding "bargaining" over matters that are already the subject of government wide rules was clearly to prevent individual agencies from adding new substantive requirements at the bargaining table. Under EEOC's argument—contrary to uniform practice—contracts could never incorporate any provision in which an agency agrees to comply with an existing statute, rule or regulation. Plainly, that is not what Congress had in mind when it precluded "negotiation" over matters which are covered by a government-wide rule or regulation.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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